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Post-Lecture Discussion

SPEAKER: HONORABLE JOSEPH F. WEIS, JR.
MODERATOR: JOSEPH P. BAUER
SPEECH: "ARE COURTS OBSOLETE?"
DATE: FEBRUARY 21, 1992

Professor Bauer: [Professor, Notre Dame Law School.]

Thank you, Judge Weis. We now have time for comments and questions.

Participant: I wonder if you could give law students some guidance as we try and embark in the profession. The way you portrayed our system is that we don't really seek the truth as much as protect our clients. How are we as ethical professionals supposed to balance that when we're geared and we're taught for three years how to manipulate a system and to use formalistic evidentiary rules for the sake of our clients and not for the sake of the truth? And you as a judge, how do you think we fit into this? How should we deal with that, what I consider a dilemma?

Judge Weis: I don't know that it's always a dilemma. Once in a great while you will have to make a real choice. But most of the time, the rules that you're asked to enforce can be advocated and pushed by you without violating the search for truth, if you really want it to work that way.

You have to make decisions, I think, as to whether what you're trying to do is right or wrong. And often times it comes up during a trial. I suppose the classic example is the trial lawyer who is convinced that the witness is telling the truth and yet proceeds to do everything in his power to impugn the credibility of that witness so that the jury will be misled. I don't think a lawyer is required to do that. I think in a situation like that the lawyer's obligation to the cause of justice and to the court predominates over his obligation to present his client's cause. I don't think that a lawyer has to push his client's cause by any means fair or foul to win. I'm afraid that that prevails too often today in the courtroom. I think that you still have to retain your sense of right and wrong, although your client is entitled to all the protections that the law gives. And I guess the real example of this is in a criminal case

where the law requires that the prosecution prove its case beyond a reasonable doubt. Certainly the criminal lawyer has the right to require the state to produce that evidence, but it does not require the lawyer to present perjured evidence or to twist or distort evidence on the prosecution's side.

I wish we had a little bit more of the teaching of what's right and wrong in the law schools. We need it, rather than how to manipulate the system, as you put it.

Participant: I didn't mean to put our professors on the spot.

Judge Weis: Well, I think lawyers understand, and I hope you know the difference between right and wrong and what truth is and what justice is.

Participant: Yes. You alluded to it yourself by saying that you think some of it is being lost in the courtroom. That's the sense that I got, that the whole litigation process is so result oriented, and that's part of the tension of trying a case.

Judge Weis: Well, I'm afraid that does exist out there. I recall one case in particular where two large, well-known, national firms spent innumerable pages in their briefs and supplemental offerings doing nothing but attacking each other personally and saying nothing about the merits of the dispute, and left the judges with a very poor taste in their mouths for those lawyers. There, they thought, I guess, they could get an advantage for their clients by personal, snide, sarcastic remarks about the other side, and they had just the opposite result.

It's disheartening for us to see lawyers who will slant and twist the facts in their briefs. In some instances, I have picked up the appellant's brief and read it and thought, how in the world could the trial court have come to this result? And then I've picked up the other side's brief and thought that this must have been tried on a different day; it must have been in a different state; they aren't the same case at all.

So my advice to my students in preparing a brief, in getting the statement of facts together is to have it bear some resemblance to what happened. Even if you can't bend all the way to give the other side the breaks they're entitled to, make it at least reasonably the same type of case.

Participant: Have you seen in operation the victim/offender reconciliation programs that the local Mennonites here promoted; and also in Pennsylvania they are very strong? That's for minor cases, but have you seen the operations of that kind?

Judge Weis: We haven't had much of a sampling of those cases on appeal as yet, no. But I think we'll be seeing more of them in the future.

It points out something interesting, I think, that is often overlooked. And that is, that there is this sense of retribution, the feeling of revenge by the victim that has to be taken care of in some way by the justice system. Because if the victims don't feel they have been treated fairly or some punishment has been inflicted on the perpetrator, they'll leave the court system and take justice into their own hands, and we'd go back to the days of vigilante justice. That's a consideration that we just can't overlook. I think perhaps the opportunity for victims to make a statement gives them a chance to blow off some steam and get their resentment out in the public, and they'll feel better afterwards.

Professor Bauer: I wonder, Judge, just following up on the earlier question. I mean, the fact of the matter is that the rules of evidence are structured in such a way that not all of the evidence which is possibly even relevant is introduced. There are other values that are involved as well, whether it's in the criminal law which restricts the admissibility of evidence which is improperly seized or whether it's in a civil setting and privileges are being invoked.

Doesn't one have to bear in mind that, while the trial is in one sense a search for the truth, it's not completely a search for the truth because there are other very important values which are implicated as well?

Judge Weis: Very true. I couldn't improve on your comment there. But I think that the remedy is obviously to look at whether our rules to exclude that evidence are doing what we hoped they would. We think they do. But you know, so many of our rules are founded on the idea that jurors could neither read nor write 500 years ago. And yet, we follow the same procedures today that we did in medieval times, in many instances.

I would think that, in addition to the judge taking a more active part in the trial, the jury should as well. The whole genius

of the jury is not to have twelve people sit there like dummies and have people talk at them for days and weeks. In a complicated case where the jury has to sit there for six months or a year, it must be intolerable to be subjected to that. We could preserve the idea of the jury as a community-representative body by giving it a lot more freedom; let it appoint a secretary to take notes; allow the jury to have a little committee to suggest various avenues or approaches to the judge, or to suggest that they've heard enough of a certain kind of testimony and they want to move on to something else. Jurors should be treated as intelligent human beings, I think. And that means a lot of revisions of technique.

Participant: I wonder with the litigation explosion if courts and society aren't going to have to increasingly turn towards alternative avenues of dispute resolution or whatever you want to call it? The courts just empirically, even the federal courts or even Congress, have started to turn in that direction, and obviously groups outside of the courts have turned in that direction.

What do you do about this?

Judge Weis: Well, I agree with that, and I support A.D.R. in its various forms because the courts can't handle all of the cases themselves.

Pennsylvania has had a compulsory arbitration system for many years, and it now has limits of \$20,000, so that every case filed in the state court worth less than \$20,000 must be arbitrated. A party has the right to appeal from that decision to the court for a trial before a jury if they choose, but most people do not. They are willing to accept the result of the arbitration.

Along the idea of mediation and settlement, the study made by the Rand Institute just two years ago, I thought was revealing and rather startling. They found that most of the litigants, most of the losing litigants, were more satisfied with the results of an arbitration hearing before lawyers or a hearing before a judge or jury than they were with settlement proceedings conducted by the judge. They felt that they had an opportunity to be heard by some impartial entity, whether by the board of arbitrators or the court, and they were willing to take the lumps. But they objected strenuously to being forced into a settlement they didn't want. It was rather surprising because the judges as a whole, I think, had always felt that litigants were satisfied if a compromise was reached so they walked away with something rather than nothing or with a

smaller amount than they might otherwise have been forced to pay, but such is not the case.

Participant: If I could just ask one related question. This morning Roger Fisher talked about disputes being on the increase. I know the Federal Court Study Commission did some work on that as to some speculation about the causes of the so-called litigation crisis.

Could you discuss this?

Judge Weis: I just don't know exactly what the answer is. But whether it's fed by TV portrayals of trials and lawyers or whether it's fed by advertising or media attention to cases where people hit the jackpot, there does seem to be an increased reliance by people on going to court if things don't work out properly for them.

We're a little dismayed, too, that any societal problem, in the eyes of some people, can be solved by filing a lawsuit. Some of these cases, outside of injury or damage cases, really have no good solution.

Many of the employment discrimination cases, for example, that come before us, alleging either race, sex, nationality, whatever, really aren't based on that kind of discrimination. If you start analyzing it, you'll find that the employer and the employees didn't get along. The employee felt that he or she was treated unfairly, not necessarily because of the legal reason, but just generally. Any individual, particularly those, for example, in middle management, whose discharge from his or her company in the middle fifties will feel they've been discriminated against, and they won't recognize the fact that the recession caused the company to pull back its plans, to cut its personnel and so forth. It's all a personal slight imposed on that individual. And he or she thinks if they file a lawsuit and get a verdict they will be vindicated.

Along that line, there was a civil rights case that was decided not long ago where the employee was awarded a substantial sum for being improperly discharged. But the added remedy that the judge put on, at the request of the plaintiff, was that the employer apologize in a local newspaper for four weeks. And that caused the biggest furor in the whole case. It was not the amount of money, but the fact that the employer was forced to apologize that caused trouble. That remedy would seem to be a tradition of a Japanese lawsuit. If a person is adjudged to have been at fault, he makes a public apology, and that's considered more than ample in many cases.

Professor Fisher: [Roger Fisher, Williston Professor of Law, Harvard Law School.]

I very much welcome and agree with most of your remarks. The experience with mediation in Massachusetts, where students mediate all the small claims cases in Cambridge, so forth, is that the desire to be heard is greater. They get half an hour, an hour with the mediators, four minutes with the judge on a small claims case. Further, they succeed in settling about eighty percent of the cases, and the compliance rate with mediated agreements is greater than with judicial awards. Because the judge will say to pay \$500, and the guy hasn't got it. The mediation will be: come shovel the snow every time it snows until you earn back this, and do this, and paint the fence, and it will work it out. So that, in fact, the compliance works very well.

But one point which I would fight is the notion that our law works because people accept the courts, not because of the force behind it. But every decision involving the government, there is no force there, no superior force behind it. Every tax refund, every constitutional case, every criminal acquittal, the decision sticks because the government decides to go along with it, not because there is no super sovereign to force them to. And in international cases we are dealing with governments by in large. And the potential chance they'll comply with the fair result, whether arbitrated, mediated, or what, may be almost as good as is in the United States if they're satisfied with the process and think it's fair.

Judge Weis: Perhaps. But I think in this country and I suppose in most western countries, if the government refused to go along with a court's decision, it would, I think, face a great deal of disapproval from the citizenry. Now, I think that's what keeps government honest.

I suppose a good example was the Nixon tapes case, where the President theoretically could tell the Supreme Court to go jump in the lake. But he chose not to do that because I think he recognized that public opinion would be so strong that he just had to go along with it. I think that if this had been an international dispute, you might not have had as much popular disapproval of a government failing to abide by a decision.

Professor Fisher: It's a question of integrating the rules into the local, legal perception.

Judge Weis: Yes, right.

Professor Fisher: But there have been a dozen or more cases where Congress refused to appropriate money to the court for judgments under special circumstances.

Judge Weis: Well, yes, we've had a few historic cases such as when Andrew Jackson refused to enforce John Marshall's order to let the Indians stay in a certain territory. But I hope we're getting farther and farther away from things like that.

Professor Fisher: Think of mandatory mediation before adjudication. In California in marital cases, they say you must mediate before you go to court. I would think that you could have mandatory exposure. I'm struck by the number of people who never talk to the other side at all. They figure it's a sign of weakness if they call up the other side and say they want to discuss settlement. So the case comes to the court, or even to the Court of Appeals sometimes, with no settlement discussion ever having taking place.

Judge Weis: Well, I think that's very important, and you're right that a great many cases do settle out because the parties have a chance to sit down and talk. We have found, though, that by the time that the case gets to court, you need a little extra push to dispose of it. And the strongest incentive to settlement has been a trial date.

We engaged in a process of conciliation of litigated cases in Pittsburgh beginning in the early sixties. A trial judge had decided that, instead of sitting in his chambers daily in between cases, he would begin to call cases in from the list and see if he could work out a settlement. He had a fair amount of success. I said to him one day, "I've watched your program. Why don't you wait until the cases are scheduled for trial within the next few days and see how effective your settlement process works?" And it was about three or four times more effective because the lawyers knew they either had to fish or cut bait—the decision had to be made now. There was no hope of something happening in the next year that would turn things in their favor, nothing was going to turn up as new evidence between now and next Thursday. Now you had to make the decision and that settled the case. And that has proved to be very effective.

Professor Murphy: [Edward Murphy, Professor, Notre Dame Law School.]

Judge, what extent do you think that the growth of impartial dispute settlement mechanisms has resulted from a perception that people do not think they can get justice from the official court system? I'm thinking of what seems to be an accelerating fragmentation in the society where values are no longer shared and where, therefore, one almost has to seek a smaller unit in order to find an adjudicating body that might share the value that that person has. This would be something that would seem to be ongoing in our society as we become less in agreement as to what basic principles of justice and public policy are.

Judge Weis: I don't detect that feeling as much as I do the fact that there's so much delay in reaching cases, particularly in the metropolitan areas, and litigation has become so expensive. So that if you can find a way to resolve a matter more rapidly and with less expense, compulsory arbitration, mediation, things of that nature, all of them are more acceptable to people who have been waiting years for a trial to come up:

I suppose there is some of that element, though, in our society. Our societal values are certainly different now than they were fifty years ago, but I think not as much as would give some validity to your fears.

Participant: I know you mentioned the Japanese system. We're lucky enough today to have a Japanese judge with us. From talking with him, I've seen the distaste the Japanese have for litigation.

How are we as lawyers to get our clients to focus in on the interest and come to a resolution? And before going to litigation, how did you do that?

Judge Weis: I wish I knew the answer to your question. It's just a problem of human nature, I guess. Some people are going to resent what they think is a wrong and use every means that they think is legally available in society to get their vengeance. I suppose our colleague from Japan could tell us maybe that the Japanese are perhaps not as volatile about things like that as we are. We're a pretty wild country, you know. The days of the wild west are only a hundred years ago. We are a melting pot of various societies. We like to express our feelings. We like to pop off. And

I think that carries over into areas of personal slights and personal injuries too. We really want to get in there and fight. That just seems to be our nature.

I suppose we can look to the English people maybe, that they have calmed down a bit over the past couple hundred years. I don't think they are as wild as they were back in the days of the Elizabethans when they would hang a person, then split him up one side, and chop his head off, put it on a pike, and parade around with it. Now if we're going to kill somebody, we do it rapidly and get it out of the way.

But that whole area of inflicting pain and torture on an individual is a reflection of that same vengeance that I hope that we're beginning to subdue a little bit in today's society. Maybe I'm just being fanciful. I don't know.

Professor Bauer: Well, Judge Weis, thank you very much for that very provocative discussion.

